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No. 98-1381

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERITECH CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION

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REPLY BRIEF IN SUPPORT OF THE PETITION

The government and its supporting intervenors acknowledge that this Court invalidated Rule 319(d), the FCC's "shared transport" regulation, as inconsistent with the Telecommunications Act of 1996 ("1996 Act"). See *AT&T Corp.* v. *Iowa Utilities Board*, 119 S. Ct. 721, 735-36 (1999). The only dispute here concerns what should be done with the judgment below upholding the FCC's *Third Order*,[1] which reaffirmed and expanded the scope of that very regulation. See Pet. App. 17a (affirming "the FCC's determination that incumbent LECs must make shared transport available to entrants on an unbundled basis pursuant to section 251(c)(3)").

The question answers itself. Nobody disputes that, by vacating Rule 319 in its entirety, this Court invalidated the shared transport regulation. All parties also agree that the FCC must and will consider on remand from *Iowa Utilities Board* whether shared transport satisfies the 1996 Act's unbundled access provisions, as properly interpreted. Gov't Br. 9, 12-14; AT&T Br. 13. Because the Eighth Circuit's judgment upheld an FCC order that reaffirms and expands an invalid regulation imposing an unlawful and unenforceable obligation, the judgment should be vacated and remanded for reconsideration together with the network element remand proceedings from *Iowa Utilities Board*. Such relief not only is proper in its own right, but also would dispel lingering confusion in the lower courts — confusion sowed in large measure by the intervenors — concerning the status of the *Third Order*'s shared transport requirement after *Iowa Utilities Board*.

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 FCC Rcd 12460 (1997) ("*Third Order*") (Pet. App. 26a-84a), petition for review denied, *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 597 (8th Cir. 1998) (Pet. App. 1a-24a).

1. The government and its supporting intervenors do not and could not argue that this Court is without power to GVR the Eighth Circuit's judgment. Rather, they incorrectly maintain that this case does not satisfy the prudential standard set forth in *Lawrence* v. *Chater*, 516 U.S. 163 (1996), for entering a GVR. See Gov't Br. 9-15; AT&T Br. 11-14.

Under *Lawrence*, a GVR is appropriate "[w]here intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." 516 U.S. at 167. This case plainly satisfies that standard.

The "intervening development" is this Court's ruling that the Rule 319(d) shared transport regulation, along with the remainder of Rule 319, is invalid under the 1996 Act. The "decision below" is the Eighth Circuit's judgment upholding the *Third Order*, which reaffirmed and expanded the scope of Rule 319(d). The "premise" underlying that judgment was the assumption that Rule 319(d) was valid and enforceable under the 1996 Act. In light of *Iowa Utilities Board*, that premise is one that the Eighth Circuit undoubtedly "would reject if given the opportunity." Finally, the Court's invalidation of Rule 319(d) may — indeed, certainly would — lead the court of appeals to reconsider and reverse its previous decision upholding the *Third Order*. Pet. App. 17a.

In an effort to escape the clear implication of *Lawrence*, the government and its intervenors attempt to divert attention from the Eighth Circuit's actual judgment to the grounds expressed by the court in support of that judgment. Gov't Br. 10-12; AT&T Br. 16-18. The tactic is futile. This Court reviews judgments, not statements in opinions. See, *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Thus, although the Eighth Circuit correctly rejected

certain of the arguments advanced against the *Third Order*, what is important here is not the Eighth Circuit's rationale for its judgment, but the judgment itself. Under *Lawrence*, that judgment is the "decision below" whose central premise (*i.e.*, the existence of a valid shared transport regulation) was eliminated by the Court's intervening decision in *Iowa Utilities Board*.

Shifting gears, the government and intervenors next maintain that the Eighth Circuit's judgment should stand because *Iowa Utilities Board* already provides the relief petitioners seek here: the invalidation, remand and reconsideration of Rule 319(d). Gov't Br. 12-13; AT&T Br. 13. They argue, in other words, that the Court should leave intact an admittedly invalid lower court judgment because *Iowa Utilities Board* already made clear that the judgment is invalid. This is a non sequitur. The fact that the Eighth Circuit's judgment upholds an unlawful regulation, and therefore itself is invalid, only *confirms* that a GVR is warranted. See *Lawrence*, 516 U.S. at 167-68.[2]

The government also claims that a GVR is not appropriate because it would yield no benefits while imposing delay and further costs. Gov't Br. 15. The principal cost cited by the government is the supposedly "unnecessary round of litigation" that would ensue in the court of appeals. *Ibid.* This concern is a chimera. If a GVR were issued, the lone question before the Eighth Circuit would be whether to reaffirm its decision upholding the *Third Order*'s shared transport requirement (even though the underlying regulation has been found invalid), or to remand the *Third Order* to the FCC for reconsideration together with the network element

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[2] Moreover, inasmuch as the government is correct that the *Third Order*'s amended shared transport regulation already has been invalidated, this case may be moot and the judgment below should be vacated on nonjusticiability grounds. See, *e.g.*, *Anderson* v. *Green*, 513 U.S. 557 (1995).

remand proceedings from *Iowa Utilities Board*. That question would demand no more than abbreviated proceedings in the court of appeals. It is difficult to imagine that any party would urge the Eighth Circuit to uphold the *Third Order*'s shared transport requirement, or that the court below would not simply remand the cause to the FCC.[3]

Another alleged cost cited by the government is that a GVR would wipe out "independently significant holdings" of the Eighth Circuit that are unrelated to the FCC's improper interpretation of the Section 251(d)(2) "necessary and impair" standard. Gov't Br. 9, 14. As noted above, this Court reviews judgments, not statements in opinions. If the Eighth Circuit's judgment is incorrect, which it undoubtedly is, the court's disposition of the parties' arguments is immaterial.

In any event, the Eighth Circuit's central holding is hardly worth saving. At the time this case was briefed and

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[3] The government's supporting intervenors incorrectly suggest that the petition for certiorari seeks a direct remand to the FCC. AT&T Br. 11-12. Rather, the petition simply seeks vacatur of the decision below and remand to the court of appeals. Pet. 6. In remanding this case, however, this Court would be justified in instructing the Eighth Circuit to vacate and remand the *Third Order* to the FCC for reconsideration in light of *Iowa Utilities Board*. See 28 U.S.C. § 2106; *City of Bridgeport* v. *Bridgeport Coalition for Fair Representation*, 512 U.S. 1283 (1994) (GVR to the court of appeals with instructions to vacate the district court's judgment and remand to the district court for further consideration in light of intervening decision); *Kilpatrick* v. *Heckler*, 472 U.S. 1004 (1985) (GVR to court of appeals with instructions to remand case to the district court with instructions to remand case to agency); *Pastrana de Caraballo* v. *Heckler*, 471 U.S. 1113 (1985) (same); *Board of Governors of the Federal Reserve System* v. *Security Bancorp*, 454 U.S. 1118 (1981) (GVR to court of appeals with instructions to remand to agency to vacate administrative decision); *Spitzer Akron, Inc.* v. *NLRB*, 411 U.S. 979 (1973) (GVR to court of appeals with instructions to remand to agency for consideration of intervening decisions); *Atlas Engine Works, Inc.* v. *NLRB*, 395 U.S. 828 (1969) (same).

decided in the court of appeals, Eighth Circuit precedent held that requiring incumbent LECs to provide their competitors with preassembled combinations of network elements was inconsistent with the 1996 Act. *Iowa Utilities Board* v. *FCC*, 120 F.2d 753, 813 (8th Cir. 1997). In light of that precedent, the *Third Order* was challenged on the ground that shared transport was such a preassembled network element combination. Interpreting and applying its precedent, the Eighth Circuit held that shared transport was not a forbidden preassembled combination. Pet App. 19a-22a. That holding is now meaningless, given this Court's subsequent ruling that incumbent LECs may be required to provide preassembled combinations under the 1996 Act. In fact, the holding may be moot in light of this Court's invalidation of Rule 319. *Iowa Utilities Board*, 119 S. Ct. at 737 ("our remand of Rule 319 may render the incumbents' concern [about preassembled combinations] academic"). There is nothing to be gained by preserving the Eighth Circuit's application and interpretation of its previous and now-invalid holding.

While a GVR would impose few (if any) costs, it would yield significant benefits. As an initial matter, a GVR would vacate a facially invalid lower court judgment. Even more important, a GVR would dispel lingering confusion in the state commissions and lower federal courts over whether the shared transport requirements set forth in the *Third Order* and upheld by the judgment below somehow survived this Court's vacatur of Rule 319 in *Iowa Utilities Board*.

Indeed, supporting intervenors' apparent motive in opposing certiorari is to perpetuate that confusion. Contrary to the position they adopt in this Court, certain intervenors have contended in the lower courts — with some success — that the *Third Order* and the judgment below not only remain viable after *Iowa Utilities Board*, but continue to obligate incumbent LECs to provide shared transport as an unbundled

network element under Section 251(c)(3).[4] By vacating the Eighth Circuit's judgment, this Court will foreclose this improper and misleading tactic, avoid unnecessary litigation in the district courts and courts of appeals, and ensure that incumbent LECs are not subject to a shared transport obligation that all parties agree (at least in this forum) is invalid and unenforceable.

2. The government and intervenors suggest that petitioners are not entitled to a GVR because petitioners did not argue in the court of appeals that the *Third Order* misapplied Section 251(d)(2). Gov't Br. 10-12; AT&T Br. 17-18. This argument misses the point. Petitioners seek a GVR on the ground, among others, that *Iowa Utilities Board* eliminated the central premise underlying the *Third Order* and the Eighth Circuit's judgment (*i.e.*, the assumed validity of the FCC's shared transport regulation). Pet. 5. The government and intervenors do not and could not argue that petitioners waived *that* argument.

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[4] See, *e.g.*, *Wisconsin Bell, Inc.* v. *Public Service Comm'n of Wisconsin*, Civ. Action No. 98-C-11-C (W.D. Wis.), Supplemental Brief of MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., at 21-25 (filed Mar. 11, 1999). Intervenors AT&T and MCI prevailed on this argument in *Michigan Bell Tel. Co.* v. *Strand*, 26 F.Supp.2d 993 (W.D. Mich. 1998) (upholding State commission order requiring incumbent LEC to provide shared transport, based upon the *Third Order* and the judgment below), reconsideration denied (Mar. 17, 1999) ("for the reasons stated [by AT&T and MCI] in the Brief in Opposition, the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*[] supports, not contradicts, the reasoning behind the Court's issuance of judgment in this matter"). MCI recently attempted to parlay that victory into another. See *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, No. 97 C 2225 (N.D. Ill.), MCI's Motion for Leave to File Supplemental Authority, at 3 (filed May 5, 1999) (citing *Strand*'s denial of reconsideration to argue that *Iowa Utilities Board* "supports, not contradicts" view "that the FCC's regulations require Ameritech to provide shared transport").

Nor did petitioners waive their argument that shared transport fails to satisfy the Section 251(d)(2) "necessary and impair" standard. When petitioners filed their briefs in the court of appeals, a previous Eighth Circuit panel already had upheld the FCC's interpretation of Section 251(d)(2). *Iowa Utilities Board* v. *FCC*, *supra*, 120 F.3d at 810. Petitioners, of course, preserved the issue in this Court and ultimately prevailed in *Iowa Utilities Board* — after the Eighth Circuit issued its judgment in this case. Having contemporaneously preserved the Section 251(d)(2) issue in this Court, there would have been no point for petitioners to reassert their argument in the court of appeals in this case and "demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which [petitioners were] privy and over [their] vigorous objection." *United States* v. *Williams*, 504 U.S. 36, 44 (1992). This Court may "undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *Id.* at 44-45; see also *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). This principle applies with equal force where, as here (Pet. App. 17a-18a), the court of appeals gives "summary treatment" to the issue at hand. See *Williams*, 504 U.S. at 42 n.2.

Moreover, in the immediate aftermath of the Eighth Circuit's affirmance of the FCC's toothless interpretation of Section 251(d)(2), it would have been equally pointless for petitioners to press the specific argument that shared transport failed to satisfy that provision. As this Court held, the FCC had rendered Section 251(d)(2) a nullity by interpreting

it to mean "that whatever element can be provided must be provided." *Iowa Utilities Board*, 119 S. Ct. at 735.[5]

3. Finally, the government and its supporting intervenors contend that a GVR would be inappropriate because *Iowa Utilities Board* did not invalidate *all* aspects of the *Third Order* and the Eighth Circuit's opinion. Gov't Br. 15-16; AT&T Br. 12-13. This contention is absurd. It may be that certain portions of the *Third Order* and certain holdings of the Eighth Circuit remain viable after *Iowa Utilities Board*. However, the *Third Order* is unlawful insofar as it reaffirmed and expanded the scope of the now-vacated FCC Rule 319(d). And the judgment below is erroneous insofar as it upholds the *Third Order*'s "determination that incumbent LECs must make shared transport available to entrants on an unbundled basis pursuant to section 251(c)(3)." Pet. App. 17a. A GVR certainly is warranted under these circumstances.

In fact, the FCC only recently advocated analogous relief in an Iowa federal district court. The state commission required the incumbent LEC to provide shared transport as an unbundled network element, and the incumbent appealed that determination to the federal district court under 47 U.S.C. § 252(e)(6). Acting as *amicus*, the FCC urged the district court to remand the shared transport provision to the state commission in light of this Court's vacatur and remand of Rule 319 in *Iowa Utilities Board*. See *U S WEST Communications, Inc.* v. *Thoms*, Civ. Action No. 4-97-CV-70082 (S.D. Iowa), Supplemental Brief of the Federal Communica-

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[5] In any event, petitioners did argue below that access to shared transport — which is nothing short of the incumbent LEC's entire interoffice network — is not essential for competitors to compete in local service markets, but rather provides an unfair advantage that Congress never intended. See C.A. Br. 31-35; C.A. Reply Br. 16-25 (arguing, *inter alia*, that shared transport is not essential to the prospects for broad-based local competition).

tions Commission as *Amicus Curiae*, at 9 (filed Mar. 15, 1999). The FCC correctly argued that incumbent LECs could not be required to provide shared transport unless and until the FCC makes "its threshold determinations with respect to Section 251(d)(2)" on remand. *Ibid.*

In sum, petitioners seek to vacate a court of appeals judgment upholding an FCC regulation that *all parties agree is invalid and unenforceable*. Such relief not only is proper in its own right, but also would dispel confusion as to the legal status of the *Third Order*'s amended shared transport requirement after *Iowa Utilities Board*. Neither the government nor its supporting intervenors provide any principled basis for denying this sensible housekeeping relief.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the cause remanded for reconsideration with the network element remand proceedings from *AT&T Corp.* v. *Iowa Utilities Board*, *supra*.

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